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ABSTRACT

Because of a congruity of developments in the knowledge base concerning tests, external political factors, and legal factors, responsible use of employment tests could be on the verge of widespread acceptability. However, the possibility also exists that tests will once again become the scapegoat for "bad news." This review of the legal challenges to the use of employment tests shows both the opportunities and risks that currently confront employment testing. Challenges to tests of mental ability actually predate the Civil Rights Act of 1964. In the "Griggs v. Duke Power Co." decision of 1971 the Supreme Court announced the "Disparate Impact" theory of discrimination and approved the standards of the Equal Employment Opportunity Commission that required an employer to show that a test is valid for the job or class for which it is used. After almost 20 years, the Supreme Court has altered the disparate impact standard and made it much easier for employers to justify tests. A series of court cases illustrates the recent decline in the number of cases involving significant issues in testing. In the 1980s, plaintiffs began to turn away from the courts, where they often lost, and turned toward the federal bureaucracy and Congress, as exemplified by some provisions of the 1991 Civil Rights Act. (Contains one table and one graph.) (SLD)

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ARE WE NOW, WHERE WE WERE THEN --- THE BELL CURVE AND THE GINGRICH REVOLUTION - IMPLICATIONS FOR EMPLOYMENT TESTING LITIGATION

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IMPLICATIONS FOR EMPLOYMENT TESTING LITIGATION

Keith M. Pyburn, Jr.
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I. INTRODUCTION

The use of employment tests in this country is at a delicate point. Because of a congruence of developments in the knowledge base concerning tests, external political and legal factors, responsible use of tests could be on the verge of widespread acceptability. These same factors, however, offer the possibility that tests will once again become the scapegoat for "bad news." A review of the history of the legal challenges to the use of employment tests shows both the opportunity and the risks which currently confront employment testing.

II. THE EARLY YEARS

A. Challenges to the use of paper and pencil tests of general mental ability based on alleged employment discrimination actually pre-date Title VII of the Civil Rights Act of 1964.

1. Motorola Case (Myart v. Motorola.) 110 Cong. Rec. 5662, Illinois FEP Commission Hearing Examiner rules Motorola should stop using its selection procedures because they are out of date and should be replaced with culturally fair selection devices. The decision of the Examiner was ultimately reversed in Motorola, Inc. v. Illinois FEPC, 215 N.E. 2d 286 (Ill. 1966).

2. In the debate over Title VII, the fear that the law would eliminate use of these tests was raised. The authors included a provision in § 703(h) protecting "professionally developed" tests. For a discussion of the legislative history of Title VII see Dickerson v. United States Steel Corp., 472 F.Supp. 1304 (E.D. Pa. 1978).

3. After Title VII was passed the issue of the lawfulness of tests was first addressed in the 1966 EEOC Guidelines. These Guidelines included:

a. Announcement of the legal principle that a "professionally developed test" was limited to tests shown to be job-related in the particular context in which it was used. § I (c) and (d).

b. Identification of the American Psychological Association (APA) professional standards as the appropriate guides for test validity. § I(d).

c. The 1966 APA standards identified in the guidelines were applicable to all testing work, including test development, educational testing, and psychological testing for identification of emotional problems and other mental disorders. Thus, the relevance of certain specific standards to the employment context was tangential at best.

OFCCP Testing Order, September 24, 1968. Federal Register, 33, No. 186 at 14392-14394.

4. The Courts adopt the requirement that employers must show tests are job-related if they have disparate impact. Hicks v. Crown-Zellerbach, 319 F.Supp. 314, 2 FEP 1059 (E.D. La. 1970), modified, 321 F.Supp. 124 (E.D. La. 1971).

5. In 1970 the EEOC issued new testing guidelines. These guidelines were all but impossible to comply with. Under these guidelines an employer could justify the use of tests if they disproportionately excluded minority or other protected group applicants only if the employer could show:

a. The test was valid for the specific job in question. That is, validity was demonstrated on a job-by-job basis.

b. The test was shown to be valid separately for minority group members.

B. There were no available suitable alternative selection procedures which would serve the employer's legitimate business purposes and result in less disparate impact.

III. GRIGGS V. DUKE POWER AND ITS AFTERMATH

A. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court announced the "Disparate Impact" theory of discrimination.

1. In announcing the "disparate impact" theory of employment discrimination, the Supreme Court in Griggs v. Duke Power Co. , 401 U.S. 424 (1971), also approved the EEOC's standards requiring an employer to show that a test is valid for the particular job or job class for which it is used. The Court said:

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

401 U.S. 432-433.

2. This principle was expanded and reiterated in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

B. Because it was all but impossible to comply with the 1970 EEOC guidelines, many employers chose to abandon the use of tests.

C. In 1978 the federal agencies issued the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. S 1602 et. seq.). The Guidelines eased some of the most onerous provisions of the 1970 EEOC Guidelines.

D. After almost twenty years of following the Griggs standard, in 1989 the Supreme Court clearly altered the standard for evaluating "disparate impact" cases.

1. In Wards Cove Packing Co., Inc. v. Atonio, 109 S.Ct. 2115 (1989), the Court reinterpreted the Griggs v. Duke Power Co. principles. In Atonio, the Court, in describing the employer's burden in a disparate impact case concluded:

> Though we have phrased the query differently in different cases, it is generally well established that at the justification stage of such a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. . . . The reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be

> practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster. (Emphasis added).

109 S.Ct. 211 (1989) at 2125-26.

E. Moreover, the Court relieved the employer of carrying the burden of persuasion on the issue of "job relatedness."

> In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff. . . . "[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." Watson, supra, 487 U.S., at _, 108 S.Ct., at 2790 (O'CONNOR, J.) (Emphasis added).

Id. at 2126.

F. These legal standards were much easier to meet than those previously imposed on employers who used tests.

IV. CHANGING PROFESSIONAL OPINION

A. When Title VII was passed there was widespread belief in the testing community that in fact test valid in some locations or for some jobs would be found not to be valid for other jobs and/or oat other places. Similarly there was s a belief that tests worked differently for blacks and other minorities groups than they did for whites. See Guion, R. M., Personnel Testing, New York: McGraw-Hill (1956) at 491-493.

B. Subsequent study of the question of whether tests are biased against blacks demonstrated the fallacy of this argument. Research on this issue demonstrated the phenomena does not generally occur. Crooks, L.A. (ed.) . An Investigation of the Sources of Bias in the Prediction of Job Performance: A Six-Year Study. Educational Testing Service, 1972.

1. Guion, one of the original supporters of the theory of cultural biases in tests concludes after review of ETS' six-year study (Crooks, L.A. (ed.)), supra.

"In light of my previously published views (Guion 1966), the findings of these studies are not personally very satisfying. There is some, but certainly not much, support for a general phenomenon of differential validity . . . I would summarize the information here, and that emerging in the general literature as well, by suggesting that, as a general rule, the validity of a test against a specified criterion is likely to be about the same for all comers." (Crooks, 1972, p. 172).

2. During the 1970's the battle over whether differential validity in fact existed was frequently in the psychological journals.

Boehm, V.R. Differential prediction: A methodological artifact? Journal of Applied Psychology, 1977, 62, 146-154.

Hunter, J.E. & Schmidt, F.L. Differential and single-group validity of employment tests by race: A critical analysis of three recent studies. Journal of Applied Psychology, 1978, 63, 1-11.

Katzell, R.A. & Dyer, F.J. Differential validity revived. Journal of Applied Psychology, 1977, 62, 137-145.

Schmidt, F.L., Berner, J.G. & Hunter, J.E. Racial differences in validity of employment tests: Reality of illusion? Journal of Applied Psychology, 1973, 58, 59.

3. In-1979 a major review was published in which authors examine 866 validity studies to see if they support the theory of differential validity. Authors find no support for the existence of this theory.

Hunter, J.E., Schmidt, F.L. and Hunter, R. Differential Validity of Employment Tests by Race: A Comprehensive Review and Analysis. Psychological Bulletin. 1979, 86, 721-735.

4. It has been reported that the expert community on this issue is now of one mind: "Overwhelmingly, the evidence is that the major standardized tests used to help make school and job decisions do not underpredict black performance, nor does the expert community find any other general or systematic difference in the predictive accuracy of tests for blacks and whites." Hernnstein, R.J. & Murray, C. 1994. The Bell Curve. New York. The Free Press. p. 281.

C. Despite professional psychological opinion that differential validity does not exist the federal agencies require test users to examine the question where technically feasible. Uniform Guidelines § 14 (B) (8) .

D. In addition to facing the Guidelines requirement, test users now have a line of judicial precedent holding examination of the issue of single group and/or differential validity is important to a legally acceptable showing of test validity.

1. United States v City of Chicago, 549 F.2d. 415, 433 (7th Cir.), aff'd, 567 F.2d. 730 (7th Cir. 1977), cert. denied, 436 U.S. 932 (1978). Requirement of EEOC Guidelines that test must be shown to be valid for both minorities and whites is not a "mere technicality."

2. United States v. Georgia Power Co., 474 F.2d. 906, 914 (5th Cir. 1973), vacated, 634 F.2d. 929 (5th Cir. 1981), 456 U.S. 952 (1982). Failure to show that test does not "screen out blacks as black" is substantial fault in validity study.

E. Generalizability

1. Based on the then well-accepted assumption that the validity of a test in one particular location does not show whether the test will be valid in any other location, the EEOC included a requirement of situational validation in the 1966 Guidelines [§(d)]. See Ghiselli, The Generalization of Validity, Personnel Psychology, 1975, 12, 397. Guion, Personnel Testing, New York: McGraw Hill, 1965 at p. 366.

2. This requirement was carried forward into the 1970 EEOC Guidelines (§ 1607.7) and the Uniform Guidelines (§ 15-E).

3. The assumption that validity is situationally specific (a test valid for selection of supervisors at one plant may not be valid for selection of supervisors at another plant) has now been shown to be false. Schmidt, F.L., Hunter, J.E., New Research Findings in Personnel Selection. Myths Meet Realities in the 1980's. Prentice-Hall, 1980.

4. Further, psychologists previously assumed that tests of general mental ability could well be valid for a carpenter's job but not for a pipefitter's job. Thus, validity is required to be shown for each job. See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Many psychologists now believe that tests can be generalized to broad categories of job families. Schmidt, F.L., Hunter, J.E., and Pearlman, K. Test Differences and Validity of Aptitude Tests in Selection: A Red Herring, Journal of Applied

Psychology, In Press, 1981.

5. However, evidence of "generalizability" probably does not supply evidence which complies with the Uniform Guidelines. (Uniform Guidelines § 15).

The Questions and Answers issued by the federal agencies to interpret the Guidelines also reiterate the "situational specificity" doctrine.

> 43.Q. Can a selection procedure be a valid predictor of performance on a job in a certain location and be invalid for predicting success on a different job or the same job in a different location?
>
> A. Yes. Because of differences in work behaviors, criterion measures, study samples or other factors, a selection procedure found to have validity in one situation may have validity in different circumstances. For these reasons, the Guidelines requires that certain standards be satisfied before a user may rely upon findings of validity in another situation.

Question and Answer No. 43.

6. Contrary to these principles, in Pegues v. Miss. St. Employment Service, 22 FEP 389, 403 (N.D. Miss. 1980) aff'd in part rev'd in part 699 F.2d. 760 (5th Cir.), cert. denied, 464 U.S. 991 (1983) the district judge, after hearing expert testimony, concluded:

> "16. Empirical research has demonstrated that validity is not perceptibly changed by differences in location, differences in specific job duties or applicant' populations. Valid tests do not become invalid when these circumstances change. Plaintiffs' allegation that validity is specific to a particular location, a particular set of tasks and to a specific applicant population, or in other words, that a valid test in one set of circumstances is not valid in circumstances not perfectly identical is not true. (Testimony of Dr. John Hunter.)"
>
> "21. No differences between the job duties in the research sample and the jobs in Bolivar County were specified. According to research, even gross changes in Job duties did not destroy validity. It follows that small and/or hypothesized differences have little or no effect an validity. Plaintiffs have not shown that the USES tests

were invalid because the tasks of the jobs in the research setting may have been different from those in Bolivar County. (Testimony of Dr. John Hunter.)"

22 FEP at 403-404.

This statement provides the single clearest defeat of the situational specificity doctrine. Unfortunately, this was not an issue addressed by the Court of Appeals in its resolution of the case.

7. However, in EEOC v. Atlas Paper Box Co., 868 F.2d. 487, (6th Cir.), cert. denied, 58 U.S. L.W. 3213 (1989), the Sixth Circuit unequivocally rejected the entire concept of validity generalization.

a. Atlas was using the Wonderlic test to select clerical employees. There was no local validity study. Dr. John Hunter testified regarding validity generalization, and concluded the Wonderlic was valid for all clerical jobs. In the District Court, Atlas' use of the Wonderlic test was found to be lawful. However, the Court of Appeals reversed this decision and rejected the use of evidence of validity generalization as a basis for justifying the use of a test.

b. The Court of Appeals found there was adverse impact and then rejected the District Court's conclusion of validity stating:

> We note in respect to a remand in this case that the expert witness offered by defendant, John Hunter, failed to visit and inspect the Atlas office and never studied the nature and content of the Atlas clerical and office jobs involved. The validity of the generalization theory utilized by Atlas with respect to this expert testimony under these circumstances is not appropriate. Linkage or similarity of jobs in dispute in this case must be shown by such on site investigation to justify application of such a theory.

EEOC v. Atlas Paper Box Co., 868 F.2d. at 1490.

c. Judge Cook wrote separately offering an expanded critique of the theory of validity generalization.

> The premise of the validity generalization theory, as advocated by Atlas' expert, John Hunter, is that intelligence tests are always valid.

> The first major problem with a validity generalization approach is that it is radically at odds with Albemarle Paper Co. v. Moody, supra, Griggs v. Duke Power Co., supra, relevant case law within this circuit, and the EEOC Guidelines, all of which require a showing that a test is actually predictive of performance at a specific job. The validity generalization approach simply dispenses with that similarity or manifest relationship requirement. Albemarle and Griggs are particularly important precedents since each of them involved the Wonderlic Test. . . . Thus, the Supreme Court concluded that specific findings relating to the validity of one test cannot be generalized from that of others.

EEOC v. Atlas Paper Box Co., 868 F.2d. at 1499.

d. In his analysis, Judge Cook takes the factual conclusion of Albemarle (that is, validity is situationally specific) based on the professional opinion at the time, and turned it into a rule of law. Judge Cook concludes:

> The kind of potentially Kafkaesque result, which would occur if intelligence tests were always assumed to be valid, was discussed in Van Aken v. Young, 451 F.Supp. 448, 454 (E.D. Mich. 1982), aff'd 750 F.2d. 43 (6th Cir. 1984).
>
> These potential absurdities were exactly what the Supreme Court in Griggs and Albemarle sought to avoid by requiring a detailed job analysis in validation studies. As a matter law, Hunter's validity generalization theory is totally unacceptable under the relevant case law and professional standards. (Emphasis added).

EEOC v. Atlas Paper Box Co., 868 F.2d. at 1499.

e. There is a lack of understanding by the Court of the validity generalization theory.

> Atlas' validity generalization theory ignores the teachings of Albemarle by implying that no linkage or similarity between those jobs which had been previously researched by Hunter and those at the Company need be shown. The similarity was simply assumed.

EEOC v. Atlas Paper Box Co., Slip Op. at 26.

Contrary to Judge Cook's conclusion, the validity generalization theory does not "assume" similarity in jobs. Rather, it has determined, based on analysis, that the degree of similarity is irrelevant. It is this essentially factual conclusion that conflicts with the theory of Albemarle and the Uniform Guidelines.

8. While the courts have not routinely accepted broad generalizability claims, they appear willing to "transport" validity where job similarity is documented. Cormier v. PPG Industries, Inc., 519 F.Supp. 211 (W.D. La. 1981, aff'd 702 F.2d 567 (5th Cir. 1983), Bernard v. Gulf Oil Corp., 890 F.2d 735 (5th Cir. 1989).

F. Professional psychological opinion on the issue has changed dramatically. In 1985 Division 14 of the American Psychological Association published revised Principles on this issue.

1. 1985 Division 14 Principles: "Current research has shown that the differential effects of numerous variables are not so great as heretofore assumed; much of the difference in observed outcomes of validation research can be attributed to statistical artifacts.

To the extent that validity generalization evidence is available, researchers may rely on it to support the use of selection instruments."

G. Perhaps the single statement which best describes the potential impact of the general acceptance by the courts of this theory was offered by the Lawyer's Committee for Civil Rights Under Law before the Subcommittee on Employment Opportunity of the House Committee on Education and Labor in December of 1984:

"For some years, the officials of the U.S. Office of Personnel Management responsible for developing the government's job tests have been pushing a new theory called 'validity generalization.' Based entirely on reviews of the published results of large numbers of validation studies, without any check of such, studies to determine whether the studies reviewed had been performed in accordance with professional standards, and largely ignoring the likelihood that developers do not publicize their failures, they have concluded that the validity of tests is not limited to the particular jobs for which studies have been done, and that the findings of validity are not even limited to the tests that were studied.

> If this 'validity generalization' approach is accepted, there would be no more need for any employer to perform any study of the validity of a test which operates to exclude minorities or women at a disproportionately high rate. Validity would always be presumed, and it would necessarily follow that no employer could ever lose a testing case.

Testimony of Richard Seymour of the Lawyer's Committee for Civil Rights Under Law.

H. Contrasted with these judicial opinions and Mr. Seymour's prediction of doom is the following conclusion from The Bell Curve:

> The most comprehensive modern surveys of the use of tests for hiring, promotion, and licensing, in civilian, military, private, and government occupations, repeatedly point to three conclusions about worker performance, as follows.
>
> 1. Job training and job performance in many common occupations are well predicted by any broadly based test of intelligence, as compared to narrower tests more specifically targeted to the routines of the job. As a corollary: Narrower tests that predict well do so largely because they happen themselves to be correlated with tests of general cognitive ability.
> 2. Mental tests predict job performance largely via their loading on *g*.
> 3. The correlations between tested intelligence and job performance or training are higher than had been estimated prior to the 1980's. They are high enough to have economic consequences.

Hernnstein, R.J. & Murray, C. 1994. The Bell Curve. New York. The Free Press.

V. TESTING AND AFFIRMATIVE ACTION

A. The Guidelines state:

> Relationship between validation and elimination of adverse impact, and affirmative action. Federal equal employment opportunity law generally does not require evidence of validity for a selection procedure if there is no adverse impact: e.g., Griggs v. Duke Power Co., 401 U.S. 424. Therefore, a user has the choice of complying either by providing evidence of validity (or otherwise justifying use in accord with Federal law), or by eliminating the adverse impact. These options have always been present under Federal law, 29 CFR 1607.3; 41 CFR 60-3.3(a); and the Federal Executive Agency Guidelines, 41 FR 51734 (November 23, 1976). The December 30 draft guidelines, however, clarified the nature of the two

options open to users.

B. This provision was justifiably criticized as encouraging the use of non-validated procedures. Moreover, employers, particularly in the private sector where the absence of civil service restrictions offered greater flexibility, moved to systems that allowed for the use of tests but also through some form of affirmative action eliminated adverse impact.

C. Tests can be combined with a race/sex/national origin conscious system that insures there is no "disparate impact." However, good "bottom line" statistics are not an absolute defense to Title VII liability. Connecticut v. Teal, 457 U.S. 440 (1980). Moreover, such "race conscious" systems are also unlawful under Title VII unless they are done pursuant to a valid temporary affirmative action plan. Johnson v. Transp. Agency Santa Clara City, Cal., 480 U.S. 616, 107 S.Ct. 1442 (1987).

D. The Use of Race Norming

The most overt procedure for eliminating adverse impact is race norming. This practice, accomplished in a myriad of ways, essentially equates group performance on the tests and thereby allows the employer to hire from the best available applicants of each group.

The practice was unlawful under Title VII and was expressly declared so in the 1991 Civil Rights Act. 42 U.S.C. 2000e-2(l).

E. Moreover, with the substantial changes that occurred in the 1994 elections in Congress, the legitimacy of various forms of affirmative action is being reevaluated at this time.

F. This month in Adarand Constructors, Inc. v. Federico Pena, et al., 1995 WL 347345 (June 1995), the Supreme Court held that all governmentally imposed affirmative action that involves granting preferences to members of an identified group because of their membership in that group can be justified only upon meeting a strict scrutiny test demonstrating that the affirmative action is narrowly tailored and essential to support legitimate governmental interests. Whether many governmentally imposed affirmative action programs can withstand challenge under this test is debatable but it is clear that many such programs will have to be reduced in scope by the elimination of preferences or they will have to be supported by the development of factual justification for the program. It is arguable that Adarand limits governmentally mandated affirmative action to situations which are designed to remedy prior demonstrated discrimination. If so, using affirmative action to offset current adverse impact of tests may not be

justifiable.

VI. THE COURTS TREATMENT OF TESTS IN THE 1990'S

A. The number of reported cases involving significant testing issues is declining. The attached graph provides a three year trend analysis of data generated by a Westlaw search of the number of district and appellate court cases involving the Uniform Guidelines.

This decline is due to a myriad of factors including:

1. In the 90's, Civil Rights groups focused attention on Congress seeking reversal of Supreme Court decisions. At this time, essentially only DOJ and the Lawyers Committee are bringing cases challenging tests.

2. As the law has become more settled, more cases are resolved before trial. Many settlements replace tests with other tests.

B. Some testing cases are being resolved on summary judgment. Taylor v. James Rivers Corp., 1989 WL 165953 (S.D. Ala).

If you had asked lawyers in 1972 could you get a summary judgment in a case involving the validity of a general mental ability test they would have scoffed at the idea. But now that has and will continue to happen.

C. Testing challenges now focus on somewhat trivial issues.

1. See e.g. Police Officers for Equal Rights v. City of Columbus, Ohio., 916 F.2d 1092.

> "We agree with the district Court that the test was not improper merely because it was, to some extent, a test of knowledge," at 1098.

2. See e.g. United Black Firefighters Association, et al v. City of Akron, et al., 1994 WL 774510. Expert witnesses, R.S. Barrett and G.V. Barrett argue over how much evidence is needed to show content was valid test reasonably, proportionally related to importance KSA's of job.

VII. THE OPTIONS FOR EMPLOYEE SELECTION AND THEIR CONSEQUENCES

A. Is Selection of Employees Really Important?

1. Civil rights groups, supported by various federal agencies, have fostered the idea that the selection of "better" employees is not really very important to the operation of a business. The argument is made that employees should use standards which identify those who meet the "minimum qualifications" for the job.

2. The minimal qualification argument is misleading in that it assumes job performance can be divided into acceptable versus not acceptable and applicants can be classified as "qualified" versus "unqualified." In fact, job performance varies along a continuum from very high to very low.

3. The argument that selecting better applicants based on "valid" tests may not really be very important has been accepted in some judicial decisions. See NAACP, Ensley Branch v. Seibels, 14 FEP 670 (D.C. Ala. 1977) aff'd 616 F. 2d 812 (5th Cir. cert. denied, 449 U.S. 1061 (1980).

4. However, work done by industrial psychologists has demonstrated- that optimal use of valid selection tests can save even a moderately sized company millions of dollars over a ten-year period. Schmidt, F.L., Hunter, J.E., McKenzie, R.C., and Muldrow, T.W. "The Impact of Valid Selection Procedure on Worker Productivity," 64 Journal of Applied Psychology 609 (1979).

5. Valid selection procedures impact on worker productivity by allowing employers to identify the applicants who will be at the high end of the continuum of performance. The fiction that "qualified" workers should be sufficient for any employer's needs ignores the reality that hiring superior employees will in fact directly increase the productivity of a given employer's workforce and therefore improve the employer's bottom line profitability.

B. If you are hiring a worker for an expected 30 year career, his wages and benefits alone can be expected to be in the neighborhood of $1 million. Most companies put a lot more review and analysis into making a decision about a $100,000 piece of equipment than they do about hiring an employee.

C. Clearly employers are faced with a difficult choice. Every hiring decision made can be the cause of expensive litigation. The alternatives include:

1. The Unstructured Subjective Interview. This process frequently results in essentially random hiring decisions. Repeated studies of employment decisions based on the interview show it to be the least effective procedure for selecting superior employees.

2. Standardized Subjective Procedures. Use of structured interviews and "assessment center" procedures has grown rapidly in the past decade. These procedures combine the results of a job analysis which identifies the particular attributes which will lead to successful job performance, with management judgment as to the effectiveness of the candidates in demonstrating the particular attribute in question. Thus, demonstrably relevant factors are subjectively evaluated in a structured manner. These systems may be effective but they are time consuming. If you have 200 applicants, it is difficult to send them all through a structured interview or assessment center.

3. Objective paper and Pencil Aptitude Tests. Research shows use of reliable aptitude tests of identifying applicants who will become superior employees. This is particularly effective when you are hiring unskilled or entry level workers into a career path where extensive training will be provided.

4. When you stack these options up against the available validity evidence at least the mathematical choice is clear.

The Validity of Some Different Predictors of Job Performance

Predictor	Validity Predicting Job Performance Ratings
Cognitive test score	.53
Biographical data	.37
Reference checks	.26
Education	.22
Interview	.14
College grades	.11
Interest	.10
Age	-.01

Source: Hunter and Hunter 1984.

Hernnstein, R.J. & Murray, C. 1994. The Bell Curve. New York. The Free Press.

VIII. THE POLITICAL REALITIES OF TODAY AND THE FUTURE OF TESTS.

A. In the 80's Plaintiffs turned away from the courts, where they were losing, and sought relief from the federal bureaucracy and Congress.

B. They got some relief from Congress in the 1991 Civil Rights Act. This included:

1. Reversal of Wards Cove decision thereby reimposing the significantly harder Griggs standard for proving "job relatedness."

2. Increased damages for Title VII violations.

3. Specific recognition of affirmative action principles.

C. After the 1994 elections the Civil Rights advocacy groups are not looking to Congress for relief. In fact in the current battle over affirmative action, Civil Rights groups are seeking to forestall substantial cutbacks to affirmative action programs.

D. The potential reduction in affirmative action, a Congress that is not receptive to expanding support for civil rights, and testing programs that are expanding suggests that the challenges may in fact go back to the courts. Clinton judicial appointments are starting to fill vacancies in the federal courts undoubtedly will be more receptive to the claims of old that tests are no good.

E. Employers continue to be faced with the practical problem of selecting employees generally from larger number of applicants. Because it may be more difficult to justify using affirmative action to create no bottom line disparity tests may once again become the focus of Title VII attacks.

F. While the profession's understanding of validity issues has changed dramatically since Title VII was passed, the courts and the public at large have not accepted these changes. This offers fertile ground for expanding litigation.

CASES INVOLVING SIGNIFICANT TESTING ISSUES